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In The
Supreme Court of the United States
October Term, 1984

THOMAS J. O'NEILL, TRUSTEE IN BANKRUPTCY OF QUANTA RESOURCES CORPORATION, Debtor,
Petitioner,

v.

THE CITY OF NEW YORK AND STATE OF NEW YORK, and THE NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION,
Respondents.

MIDLANTIC NATIONAL BANK,
Petitioner,

v.

THE NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR PETITIONER THOMAS J. O'NEILL, TRUSTEE

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QUESTIONS PRESENTED

1. Whether the right of a trustee in Bankruptcy pursuant to Section 554(a) of the Bankruptcy Code, 11 U.S.C. Section 554(a), to abandon property of the estate, which admittedly is burdensome to the estate and of inconsequential value to the estate, can be restricted by a state as a result of pre-petition conduct of the debtor.

2. Whether the Court of Appeals' reliance upon an exception to the automatic stay contained in Section 362 of the Bankruptcy Code, 11 U.S.C. Section 362, as a basis for judicially inserting an exception to the right of abandonment into Section 554(a) of the Bankruptcy Code, 11 U.S.C. Section 554(a), is inconsistent with this Court's decisions in *Ohio v. Kovacs,* 105 S. Ct. 705 (1985) and *NLRB v. Bildisco and Bildisco,* 104 S. Ct. 1188 (1984).

3. Whether the decisions of the Court of Appeals are inconsistent with this Court's decision in *United States v. Security Industrial Bank,* 459 U.S. 70 (1982), in construing the Bankrutpcy Code as requiring a trustee in bankruptcy to expend assets of the estate to effect an environmental cleanup of facilities operated by the debtor prior to the filing of the bankruptcy petition, which are of no value to the estate, thereby raising constitutional questions arising out of the "takings clause" of the Fifth Amendment.

4. Whether denying a trustee in bankruptcy the right to abandon property of the estate pursuant to Section 554(a) of the Bankruptcy Code because of purported prepetition violations of state environmental laws is violative of the Supremacy Clause of the federal constitution.

5. Whether judicial imposition of conditions upon the right of a trustee in bankruptcy to abandon property of the estate pursuant to Section 554(a) of the Bankruptcy Code, 11 U.S.C. Section 554(a), will impair bankruptcy policy and frustrate effectuation of the objectives of the federal Bankruptcy Code.

6. Whether "abandonment of property of the estate" by a trustee in bankruptcy pursuant to Section 554(a) of the Bankruptcy Code, 11 U.S.C. Section 554(a), can constitute a violation of state environmental laws and regulations.

7. Whether 28 U.S.C. Section 959(b) is applicable to a bankruptcy trustee in a liquidation proceeding and can serve as a basis for denying a trustee the right to abandon property under 11 U.S.C. Section 554(a).

8. Whether a state's claim for reimbursement of expenses for the environmental cleanup of property of the debtor is entitled to priority or administrative expense status under the Bankruptcy Code.

PARTIES

Appellants in Third Circuit Case No. 83-5142 ("New York Case") were the City of New York and the State of New York. Also appearing in that case, as *amici curiae*, were the State of Pennsylvania, the Department of Environmental Resources for the State of Pennsylvania and the State of New Jersey. Appellant in Third Circuit Case No. 83-5730 ("New Jersey Case") was the New Jersey Department of Environmental Protection. Thomas J. O'Neill, Trustee in Bankruptcy of Quanta Resources Corporation,[1] debtor, was an appellee in both cases. Midlantic National Bank and James V. Frola and Albert Von Dohlin were appellees in the New Jersey Case.

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[1]Quanta Resources Corporation, a Delaware Corporation, is a wholly owned subsidiary of Quanta Holding Corporation, a subsidiary of Waste Recovery, Inc., which in turn was a subsidiary of Warburg Paribas Becker, Inc.

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR PETITIONER THOMAS J. O'NEILL, TRUSTEE

OPINIONS BELOW

The opinions of the Court of Appeals for Case No. 83-5142 (New York) and Case No. 83-5730 (New Jersey) are reported at 739 F.2d 913 and 739 F.2d 927 respectively. The Memorandum Opinion of the District Court in *State of New York and the City of New York v. Thomas J.*

O'Neill, Trustee in Bankruptcy of Quanta Resources Corp. (App. G, 52a to 60a)[2] and the opinion of the Bankruptcy Court in the case *State of New York and City of New York v. Thomas J. O'Neill* (App. K, 69a to 75a) are unreported.

JURISDICTION

The judgment of the Court of Appeals in Case No. 83-5142 (App. D, 45a) was entered on July 20, 1984. The Amended Judgment in Case No. 83-5730 (App. E, 47a) was entered on July 25, 1984. On August 16, 1984 the Court of Appeals denied rehearing. (App. F, 49a). Petitions for writs of certiorari were filed on November 14, 1984, and granted on February 19, 1985, at which time the cases were consolidated with the Petition filed on behalf of Midlantic National Bank. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The constitutional provisions involved are the Supremacy Clause of Article VI and the "takings clause" of the Fifth Amendment. The provisions of the Bankruptcy Code involved are Sections 362, 554, and 704, 11 U.S.C.

[2]References to the Appendix are to the Appendix to the Petition for Certiorari filed by Thomas J. O'Neill, Trustee of Quanta Resources Corp.

Sections 362, 554, and 704. The case also involves interpretation of 28 U.S.C. Section 959(b). These provisions are printed in the Appendix to the Petition for Certiorari. (App. L, 76a-79a).

STATEMENT OF THE CASE

The two cases before the Court, although involving two separate sites, one in New York and the other in New Jersey, arise out of the same bankruptcy proceeding. They present the question of the proper construction of Section 554(a) of the Bankruptcy Code entitled *Abandonment of Property of the Estate,* 11 U.S.C. Section 554(a), and the inter-relationship of this section with other state and federal laws.

The question is presented in the context of the bankruptcy liquidation of a corporation which had engaged in the business of treatment of waste oils, and the attempt by the Trustee in Bankruptcy to abandon real and personal property of the estate which is alleged to have been contaminated through pre-petition conduct of the debtor. The Trustee's abandonment is opposed by the respective environmental agencies of New York and New Jersey, who seek to compel the Trustee to clean up the sites.

On October 6, 1981, Quanta Resources Corp. ("Quanta") filed a voluntary petition under Chapter 11 of the Bankruptcy Code, 11 U.S.C. Section 1101, *et seq.* On November 12, 1981, on motion of the debtor, the proceedings were converted to liquidation under Chapter 7, 11 U.S.C.

Section 701, *et seq.* Petitioner, Thomas J. O'Neill, was appointed Trustee on November 18, 1981.

The debtor corporation had operated facilities in Edgewater, New Jersey and Long Island City, New York. The New York property was owned by the debtor, while the New Jersey site was leased from two individuals, James Frola and Albert VonDohlin, appellees before the Third Circuit in the New Jersey case. All operations of the debtor corporation had ceased prior to the bankruptcy proceedings.

New York

Upon his appointment, the Trustee obtained an appraisal report of the property located at 37-80 Review Avenue, Long Island City, New York, which contained the following description:

> The subject property has been used for many years as a storage facility for waste oil and is improved with a wide variety of fuel storage tanks. We have been advised that many of these tanks now hold waste oil which is contaminated and effectively, the tanks have little or no market value. Also located on the site are several small concrete block buildings that were used in connection with this operation. In the judgment of the appraiser, the age and condition of these buildings are such that they have no value and should be removed.

The appraiser estimated the fair market value of the property as $535,000.00, but stated for "forced sale" purposes he would discount this value by 20% to $428,000.00. Mortgages on the property exceeded the "forced sale" value.

A considerable quantity of waste oil, sludge and other hazardous wastes, including oil contaminated with PCB's, was stored on the property at the time of the filing of the bankruptcy petition. It was estimated that the cost to dispose of the contaminated waste oil properly and otherwise clean up the site would be in excess of one million dollars.[3] Neither the "fair market" or "forced sale" estimates took into consideration the contaminated state of the property nor the expenditures which would be necessary in order to dispose of the oil on the site and render the property marketable.

The property was unquestionably valueless to the Trustee. Additionally, at the outset of the case, the Trustee was required to maintain 24 hour guard service at a cost in excess of $1,100.00 per week, a substantial burden to the estate.

At the initial hearing before the Bankruptcy Court on the application to abandon, the Trustee testified that he personally had borrowed $20,000.00, much of which had gone to continue the security. The Trustee simply had no funds whatsoever to pay for continued security, much less to undertake a cleanup.

On March 18, 1982, upon request of the Trustee, the Clerk of the Bankruptcy Court issued a notice to creditors of "sale by public auction or abandonment" scheduled for April 5, 1982. The notice advised that if the Trustee did not receive an offer in excess of liens on the property, he would abandon the property. No offers were received.

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[3]According to New York's Brief before the Third Circuit, following the Trustee's abandonment, the City and State undertook a cleanup operation and expended 2.5 million dollars.

Greenpoint Oil Corp. ("Greenpoint") subsequently offered to purchase the property, subject to mortgages and certain other liens, for a total price of $3,000.00. This offer was approved by the Bankruptcy Court. Counsel for Greenpoint later advised the Trustee, however, that Greenpoint did not intend to proceed with the purchase because of hazardous conditions and violations existing at the property of which Greenpoint was not aware at the time of the offer. On June 22, 1982, on application of Greenpoint, the Bankruptcy Court voided the approval of the offer.

Although the Trustee believed that the property should then be deemed to have been abandoned as of April 5, 1982, a new notice of proposed abandonment was mailed to all creditors on May 25, 1982. In response to the second notice to creditors, the State of New York filed an objection with the Bankruptcy Court on June 4, 1982. On June 7, 1982, the City of New York also filed an objection.

Oral argument on the objections was conducted before Bankruptcy Judge D. Joseph DeVito on June 8, 1982, at which time the Court directed the filing of additional briefs. On or about June 15, 1982, the State of New York filed a Memorandum in Opposition to Abandonment in which, for the first time, the State requested that the Court order that any money spent by the State or City to dispose of the waste be deemed a first lien on the property with priority over any other mortgages and liens.[4] No notice of the application to impose a lien was given to the other lienholders on the property.

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[4]As of that date, no money had been expended by the City or State.

Following additional argument on June 22, 1982, the Bankruptcy Court authorized the Trustee to abandon the property. In refusing to direct the Trustee to undertake a cleanup of the site, Judge DeVito stated:

> The City and State are in a better position in every respect than either the trustee or debtor's creditors to do what needs to be done to protect the public against the dangers posed by the PCB contaminated facility . . . For this Court to grant the relief requested by the Attorney General would do little else than to put into play an exercise in futility, and would possibly delay the parties who could be chargeable with the cleanup of the property or who have other interests to permit them to move in. That should go forth as quickly as possible and I think this determination will work in that direction.

(App. K, 73a to 74a). The claim to entitlement to a lien was rejected by the Court as unauthorized under the Bankruptcy Code. An Order incorporating the terms of the Court's oral decision was entered on July 7, 1982, effective June 22, 1982, *nunc pro tunc*. (App. J, 66a to 68a).

Notices of Appeal to the District Court were filed on July 16, 1982. Oral argument was conducted before District Court Judge Frederick B. Lacey, on January 24, 1983. At that time, and in a Memorandum Opinion (App. G, 52a to 60a), Judge Lacey affirmed the decision of the Bankruptcy Court. The New York appeal was docketed in the Third Circuit on February 28, 1983.

As noted above, cleanup of the property has been undertaken by New York, and what is now sought from the Trustee is solely payment of New York's claim for reimbursement of the money expended. The issue of the Trustee's obligation to clean up the site therefore has been mooted.

New Jersey

Quanta also operated a waste oil treatment facility located at 1 River Road, Edgewater, New Jersey, consisting of storage and product tanks and equipment for the processing of oil. In June, 1981, a sampling of the waste oil at the site by the New Jersey Department of Environmental Protection ("NJDEP") determined that levels of PCB's were present in the oil in excess of permissible levels. On July 2, 1981, Quanta agreed to cease its operations upon NJDEP's request. NJDEP further directed that certain remedial steps be undertaken by Quanta. The filing of the bankruptcy petition intervened.

For the Trustee to implement the remedial measures would have exhausted all the assets in the estate without any resulting benefit to the estate. The Trustee had no alternative but to seek authorization to abandon.

The New Jersey site was leased by the debtor and therefore the application for abandonment was limited to personal property consisting mainly of the oil in the tanks. An Order was entered by the Bankruptcy Court on May 20, 1983, authorizing the abandonment of the property effective May 17, 1983, *nunc pro tunc* (App. I, 64a to 65a).

Since the identical issue presented in the New Jersey case was already pending before the Court of Appeals, a notice of appeal by agreement to the Court of Appeals under 28 U.S.C. Section 1293(b) was filed on behalf of the NJDEP on September 21, 1983.

The New York case was argued before the Court of Appeals for the Third Circuit on October 24, 1983. No argument was heard in the New Jersey case. A divided Court of Appeals announced its decision in both matters on July 20, 1984, reversing the decisions of the Bankruptcy

and District Courts. *In the Matter of Quanta Resources Corp., etc.,* 739 F.2d 913 (3rd Circuit 1984); *In re Quanta Resources Corp., debtor, etc.,* 739 F.2d 927 (3rd Circuit 1984). The Trustee filed a Petition for Rehearing in both matters, but on August 16, 1984, rehearing was denied (App. F, 49a to 51a).

Perhaps the most concise critique of the majority opinion is to be found in Judge Gibbons' dissent in the New York case in which he took exception with the majority decision on the following counts:

1) By forcing the trustee to take possession of property in which there is no equity, the court serves no interest that the bankruptcy laws address. (739 F.2d 923).

2) There is no legislative history suggesting that the court may alter or amend the language of 11 U.S.C. Section 554(a). (739 F.2d 923).

3) Under federal law, the trustee may abandon the property. (739 F.2d 923).

4) Congress did not see fit to provide an exception to the statutory power of abandonment under 11 U.S.C. Section 554(a), whether for the public interest or any other purpose, as it has in other areas. (739 F.2d 924).

5) The majority opinion is inconsistent with the Supreme Court's recent decision in *United States v. Security Industrial Bank,* 459 U.S. 70 (1982). (737 F. 2d 924).

6) The majority's construction of the Act raises a substantial question under the taking clause of the Fifth Amendment. (739 F. 2d 925).

7) The plain language of 11 U.S.C. Section 554(a) permits abandonment in this case; moreover, there is no

legislative history to that section providing any exceptions to the statute or expressing any intent contrary to abandonment by a trustee of property found to be burdensome or of inconsequential value. (739 F. 2d 925).

8) The majority opinion sidesteps the key issue of the priority, if any, of the states' claims. (739 F. 2d 925).

9) The majority's reliance on 28 U.S.C. Section 959 (b) is off the mark. (739 F. 2d 926).

10) The suggestion that the cleanup cost might be classified as a "preservation expense" of a property is preposterous. (739 F. 2d 926).

Judge Gibbons also raised the question left unanswered by the majority of how the trustee can reach into creditors' pockets for the cost of the cleanup, and if he can, which creditor's pocket. (739 F. 2d 923). He then concluded his dissenting opinion with the observation that:

> We surely will have to affirm later when the district court points to the obvious fact that there must be a source of funds before expenditures can be made. (739 F. 2d 927).

At this point, the administration of the debtor's estate is virtually complete. All assets, other than those abandoned by the Trustee, have been liquidated. Distribution was made to secured creditors at the time the assets securing their liens were sold, and administrative expenses incurred by the trustee, including but not limited to salaries and use and occupancy claims, have been paid to the extent funds were available. The Trustee has no money from which to finance any cleanup of either facility or to reimburse the states for their cleanup costs.

SUMMARY OF ARGUMENT

Under Section 554(a) of the Bankruptcy Code, 11 U.S.C. Section 554(a), after notice and a hearing, a trustee in bankruptcy may abandon any property of the estate that is burdensome to the estate or that is of inconsequental value to the estate. The two sites involved in this case, one in New York and one in New Jersey, which contained oil contaminated with PCB's, were of no value and were burdensome to the estate. The trustee did not have sufficient assets available to finance cleanup of the sites, the cost of which would have far exceeded the value of the two properties in an uncontaminated condition. Any cleanup therefore would not have benefitted the estate.

The trustee had no alternative but to seek leave of the Bankruptcy Court to abandon the property. Abandonment was both appropriate and authorized under the Bankruptcy Code.

The decision of the Court of Appeals runs contrary to the decisions of this Court in *Ohio v. Kovacs,* 105 S. Ct. 705 (1985), and *NLRB v. Bildisco and Bildisco,* 104 S. Ct. 1188 (1984), in inserting into the Bankruptcy Code an exception to the right of abandonment under Section 554 (a), where no such exception was included or intended by Congress.

The duty of a trustee in liquidation proceedings is to reduce the debtor's property to money as expeditiously as possible so as to secure funds for distribution to general creditors in accordance with the scheme of distribution of the Bankruptcy Code. To require a trustee to retain and administer property that is valueless is contrary to

this fundamental objective of bankruptcy. For the trustee to expend other assets of the estate to clean up the sites and thereby satisfy the claims of the governmental bodies would in effect create preferences not recognized by the Bankruptcy Code.

If, as the majority held, the right of abandonment can be restricted by state and local law, the full effectuation of the objectives of federal bankruptcy legislation will be frustrated, thereby contravening the Supremacy Clause, U.S. Const. Art. VI Cl. 2.

To require a trustee in bankruptcy, who does not have sufficient assets, to administer valueless property and exhaust all other assets of the estate, which otherwise would be available for distribution to creditors, both secured and unsecured, would be violative of the Fifth Amendment to the Constitution. Such a construction of the Bankruptcy Code would further be inconsistent with this Court's decision in *United States v. Security Industrial Bank,* 459 U.S. 70 (1982).

To deny the trustee the right to abandon worthless and burdensome property would impair bankruptcy policy without any corresponding advancement of environmental policy.

A trustee in bankruptcy cannot be found to have violated state environmental laws based upon pre-petition conduct of the debtor. 29 U.S.C. 959(b) does not constitute a ban upon abandonment by the trustee under the circumstances of this case, the Trustee not having operated the debtor's business and not having violated any state laws.

The Court of Appeals failed to clearly focus on the critical and fundamental distinction in bankruptcy law between pre-bankruptcy and post-bankruptcy rights against the debtor.

ARGUMENT

Under The Facts Of This Case, The Trustee In Bankruptcy Was Entitled To Abandon The Property Pursuant To 11 U.S.C. Section 554(a).

A. The construction of Section 554(a) advanced by the majority is contrary to this Court's rule of construction announced in Ohio v. Kovacs, 105 S. Ct. 705 (1985), and NLRB v. Bildisco and Bildisco, 104 S. Ct. 1188 (1984), in judicially inserting an exception into the Bankruptcy Code where no such exception was intended or included by Congress.

Any analysis of the issues in this case must begin with the unchallenged factual finding of the Bankruptcy Court that the property was burdensome and of inconsequential or no value to the estate. The next step is to examine the statute in question, Section 554(a) of the Bankruptcy Code, which provides that:

> After notice and a hearing, the trustee may abandon any property of the estate that is burdensome to the estate or that is of inconsequential value to the estate.

11 U.S.C. Section 554(a). The purposes of this section as noted by the majority are to enable the trustee to rid the estate of burdensome or worthless assets thereby

speeding the administration of the estate and protecting the estate from diminution. Abandonment serves the creditors' interest in expeditiously obtaining a fair amount in settlement of their claims. *In the Matter of Quanta Resources Corp., etc.*, supra at 915.

In imposing conditions upon the trustee's right to abandon, the Court of Appeals relied upon the exception to the automatic stay provisions of Section 362 of the Bankruptcy Code, 11 U.S.C. Section 362, which provides that "the commencement or continuation of an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power" is not stayed by the filing of a bankruptcy petition. 11 U.S.C. Section 362(b)(4).

In *Ohio v. Kovacs,* 105 S. Ct. 705 (1985), the Supreme Court took the opportunity to disapprove of attempts to impose conditions or limitations upon various provisions of the Bankruptcy Code where the plain reading of the section did not allow such conditions or limitations. In *Kovacs,* Ohio proposed a strained interpretation of the definition of "claim" under Section 101 to support its position that an obligation under an affirmative injunction was not a claim and therefore not dischargeable in bankruptcy.

In rejecting this argument, the Court cited areas where Congress had expressly created exemptions:

> Congress created exemptions from discharge for claims involving penalties and forfeitures owed to a governmental unit, 11 U.S.C. Section 523(a)(7), and for claims involving embezzlement and larceny, Section 523(a)(4). If a bankruptcy debtor has committed larceny or embezzlement, giving rise to a remedy of

> either damages or equitable restitution under state law, the resulting liability for breach of an obligation created by law is clearly a claim which is nondischargeable in bankruptcy.

105 S. Ct. at 709, Footnote 5. The Court held that such examples of limitations expressly included in the Code by Congress refuted rather than supported Ohio's attempt to carve out a new exception.

This Court had previously addressed a similar issue in *NLRB v. Bildisco and Bildisco,* 104 S. Ct. 1188 (1984), where it was argued that collective bargaining agreements were not included within the general scope of Section 365(a) of the Bankruptcy Code, 11 U.S.C. Section 365(a), relating to executory contracts. Relying upon the fact that Section 1167 expressly exempted collective bargaining agreements subject to the Railway Labor Act, but granted no similar exemption to agreements subject to the National Labor Relations Act, the Court stated:

> Obviously, Congress knew how to draft an exclusion for collective bargaining agreements when it wanted to; its failure to do so in this instance indicates that Congress intended that Section 365(a) apply to all collective bargaining agreements covered by the NLRB.

Id. at 1195.

It must be presumed here that Congress knew how to draft an exclusion for governmental actions when it wanted to do so, as with the exception to the automatic stay under Section 362(a), 11 U.S.C. Section 362(a). The absence of a parallel exception in Section 554(a) is a clear indication of Congress' intent that the right to abandon not be subject to any exception for action by governmental

units. There is no indication in the language of Section 554(a) that any other conditions other than the "burdensome" and "inconsequential value" standards set forth in the statute should be applied.

As stated by District Court Judge Lacey in his opinion affirming the abandonment of the Long Island City facility, "reliance on Section 362 actually undercuts appellant's argument," (App.G, 60a), there being no comparable exception for governmental actions contained in Section 554 of the Code.

B. Restrictions upon the trustee's right to abandon pursuant to Section 554(a) based upon state law result in frustration of the full effectuation of the objectives of federal bankruptcy legislation and therefore violate the Supremacy Clause of the Constitution.

1. Courts cannot create categories of priorities or administrative expenses not recognized by the Bankruptcy Code.

Courts have consistently held that the original and primary purpose of bankruptcy legislation is the reduction of the debtor's property to money as expeditiously as practical, and a fair and equitable distribution of the property of the debtor to and among his creditors. States, by means of their own laws, cannot devise preferences among creditors of the debtor which the federal bankruptcy law does not recognize. *In re Universal Money Order Co.*, 470 F. Supp. 869 (S.D. N.Y. 1977); *In re Good Deal Supermarkets, Inc.*, 384 F. Supp. 87 (D. N.J. 1974).

The governmental authorities here are seeking to compel the trustee to retain and administer property which

is valueless and unprofitable, and to expend assets, which would otherwise be available for distribution to creditors, to maintain the property and dispose of the hazardous wastes located on the sites. In effect, the states are attempting to obtain a preference of one class of creditors over another, contrary to the express provisions and purposes of the Bankruptcy Code. The Supremacy Clause of Article VI of the Constitution demands that the conflict between the Bankruptcy Code and state legislation be resolved in favor of the Bankruptcy Code. Abandonment must be permitted.

Although the Court of Appeals recognized that "state law regulating the distribution of assets among creditors must give way to the all encompassing law of creditors' rights", 739 F. 2d at 920, the Court failed to recognize that, in effect, the denial of the trustee's right to abandon will result in a distribution of assets among creditors pursuant to state law rather than federal law. This result clearly is wrong, and frustrates the effectuation of the objectives of bankruptcy.

For the Court to say that the trustee must finance the cleanup would require a rearrangement of the priority of distribution not envisioned by the Bankruptcy Code. Secured and unsecured creditors would be required to pay for the cleanup of the facilities. The result would be to transfer the cost to parties who were in no way responsible for placing the contaminated oil on the sites. If the court insists that the cost of cleanup be borne by the innocent, then it is the innocent public which should carry that burden not a select innocent few. As noted by Judge Gibbons, the name of the state's game is:

> [T]ransferring the cost of cleanup to secured and unsecured creditors of the debtor, in this instance outside New York, who have no interest whatever in the Long Island City property, and who, on the record before us, were in no way responsible for placing the contaminated oil on that site.

In the Matter of Quanta Resources Corp., etc., supra at 925.

2. Under the circumstances of this case, a Trustee in Bankruptcy has no alternative but to refuse appointment or, once having accepted appointment, to resign.

Where is a trustee in bankruptcy left under the decision of the Court of Appeals? Does he remain the owner of the property forever? Which site must be cleaned first—New York or New Jersey? Can he be subject to criminal sanctions or personal liability for costs of cleanup? Can the estate never be closed? Can creditors be charged with the cost of cleanup and, if so, which creditors? These and many other important questions were left unanswered.

A perfect example of the frustration of the purposes of federal bankruptcy law which will result is found in the case of *In re Charles George Land Reclamation Trust*, 30 B.R. 918 (Bkrptcy D. Ma. 1983). The debtor in that case owned and operated a waste disposal facility. Prior to the filing of a bankruptcy petition, the debtor had entered into a consent judgment with the Commonwealth of Massachusetts requiring the debtor to undertake certain actions to bring the facility into compliance with environmental laws and regulations. The required remedial actions had not been completed as of the filing of the bankruptcy petition. The Commonwealth of Massachusetts

argued before the Bankruptcy Court that any trustee would have to immediately rectify the violations of law or otherwise find himself in violation of 28 U.S.C. Section 959(b). As a result, no private panel member would agree to serve as trustee. The United States Trustee, as a default trustee under 11 U.S.C. Section 15701(b), then brought an emergency motion for dismissal. This motion was granted.

To allow the decision of the Court of Appeals to stand would effectively preclude orderly liquidation of any debtor's estate where the debtor was under an obligation at the time of filing bankruptcy to take any remedial action under any other federal or state legislation. Nowhere in the Bankruptcy Code can there be found a legislative intent to deny such debtors the rights and protections under the Bankruptcy Code. Quite to the contrary, the Code evidences a congressional intent that claims of governmental units for environmental cleanup not be accorded priority or administrative expense status, but rather share with all other creditors in the distribution of the estate.

This Court's recent decision in *Ohio v. Kovacs,* supra, also stands for the proposition that an individual or other entity, which has engaged in business involving hazardous wastes or materials which may result in adverse environmental consequences, is not to be automatically denied the protections of the bankruptcy code.

C. Denial of the Trustee's right to abandon pursuant to Section 554(a) of the Bankruptcy Code is inconsistent with the decision of the Supreme Court in United States v. Security Industrial Bank, 459 U.S. 70 (1982), and is violative of the "takings clause" of the Fifth Amendment.

A substantial basis for Judge Gibbons' dissent was the decision of this Court in *United States v. Security Industrial Bank,* supra, where it was held that:

> The Bankruptcy Act should not be construed to destroy the interest of creditors when a substantial question arises as to whether the act constitutes a taking of property without just compensation.

In the Matter of Quanta Resources Corp., etc., supra at 924 (3rd Cir. 1984). Quoting from *Security Industrial Bank,* Judge Gibbons stated that the holding was a corollary of the longstanding doctrine that the Court is obligated:

> First (to) ascertain whether a construction of the statute is fairly possible by which the constitutional question may be avoided . . . similarly, in the absence of a clear expression of Congress intent . . . (a court should) decline to construe the Act in a manner which could in turn call upon the Court to resolve difficult and sensitive questions arising out of the guarantees of the "takings clause". (Citations omitted).

Ibid.

The majority's construction of Section 554(a) raises a substantial question under the "takings clause" of the Fifth Amendment, U.S. Const., Amend. 5, since the requested cleanup of the properties would completely ex-

haust the assets of the estate, both secured and unsecured.[5] A construction of Section 554 of the Code is available, however, which would avoid this difficult constitutional question. Section 554(a) provides that:

> After notice and hearing, the trustee may abandon any property of the estate that is burdensome to the estate or that is of inconsequential value to the estate.

11 U.S.C. Section 554(a). There is no question here but that the two facilities were burdensome to the estate and of inconsequential value to the estate.[6] Having satisfied this criteria, the plain language of Section 554(a) permits

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[5]The dissenting opinion contained the following discussion on this point:

The "taking" concern has been raised previously:

[T]he public interest cannot demand the erosion of the bankrupt's assets to the point of confiscating practically the entire estate. At some point the extent and degree of taking runs into the constitutional prohibition in the Fifth Amendment [on] the taking of private property for public use without just compensation.

In re New York, New Haven and Hartford Railroad Co., 330 F. Supp. 131, 147 (D. Conn. 1971); see also H.R. Rep. No. 595, 95th Cong. 1st Sess. 423 (1977), reprinted in 1978 U.S. Code Cong. & Ad. News, 5963, 6379:

Subsection (a) [11 U.S.C. Section 1170(a)] permits the court to authorize the abandonment of a railroad line if the abandonment is consistent with the public interest and either in the best interest of the estate or essential to the formulation of a plan . . . The authority to abandon or not to abandon lines of railroad is, of course, subject to the fifth amendment of the Constitution, which may in particular cases require abandonment in order not to erode a secured creditor's interest in the debtor's property even though the public interest dictates otherwise. *In the Matter of Quanta Resources Corp. etc.*, supra at 925.

[6]The majority held that "this factual finding is not challenged on appeal." 739 F.2d at 914, footnote 4.

abandonment in both cases, thereby avoiding the constitutional question under the "takings clause" of the Fifth Amendment.

Under the holding of *United States v. Security Industrial Bank*, supra, the Court must read Section 554(a) in such a manner as to avoid the constitutional question. Accordingly, Section 554(a) must be read as permitting abandonment under the facts of this case.

The Court should also be mindful of the potential consequences of a decision which would strip innocent lenders of all protection and require that their security be expended for a cleanup of the debtor's property. Such a result would immediately dry up all sources of financing for companies in any way engaged in the treatment or handling of hazardous materials or waste.

D. 28 U.S.C. Section 959(b) does not constitute a bar to abandonment by the Trustee.

1. 28 U.S.C. Section 959(b) is not applicable to a bankruptcy trustee in a liquidation proceeding.

Following a lengthy analysis of the provisions of 28 U.S.C. Section 959(b), the Court of Appeals admitted that Section 959(b) was "not itself an independent prohibition of the trustee's abandoning property in contravention of state law . . .", and that the scope of the section could be construed as limited to administration of the debtor's business as a going concern (739 F. 2d at 919). The Court further cited the interpretation of Section 959(b) found in Moore's:

> But Section 959(b) applies *only to the receiver in his operation of the property in his possession.* It does not apply to the distribution of the estate and does

> not require the federal receivership court to comply with state laws regulating the distribution of funds in receivership, although *Erie R. Co. v. Tompkins* should now require it to do so in cases involving only non-federal matters. (emphasis added)

7-Pt. 2 Moore's Federal Practice, ¶ 66.04[4] at 1913 (J. Moore & J. Lucas) 2d Ed. 1982. (footnotes omitted). Since Section 959(b) is not an independent bar to abandonment, can reasonably be construed as limited in scope to an ongoing business, and since the only cited authorities support this limitation, it is respectfully submitted that 28 U.S.C. Section 959(b) does not prohibit abandonment by the trustee.

2. Abandonment of property of the estate by a Trustee in Bankrutpcy in accordance with 11 U.S.C. Section 554(a) does not violate state laws or regulations.

At the heart of our disagreement with the majority is the Court's faulty premise that abandonment would be in contravention of state and local environmental protection laws. The Court of Appeals stated that the issue as to the New York site was:

> Does 11 U.S.C. Section 554 (1982) permit the abandonment of property of the bankrupt estate in contravention of state and local environmental protection laws?

739 F. 2d at 913. Again as to the New Jersey site, the Court stated that:

> [T]he trustee does not have the right to abandon property of the estate where abandonment contravenes state public health and safety laws, as it does here.

739 F. 2d at 929. This premise is factually wrong in that pre-petition actions of the debtor constituted the contra-

vention of environmental protection laws, and is legally incorrect in misconstruing the nature and effect of abandonment under the Bankruptcy Code. The trustee has taken no affirmative action as to the contaminated oil, and therefore cannot be said to be disposing of the oil in contravention of state and local laws. Abandonment cannot be equated to disposal.

The history and purpose of abandonment under the prior Bankruptcy Act and the present Bankruptcy Code indicate that the right has evolved from a "judge made rule" to a congressionally recognized power under the Bankruptcy Reform Act of 1978.[7] Discussing the background and legislative history of a trustee's right to abandon property of the estate, Collier states that:

> No provision, however, specifically dealt with the abandonment of burdensome property in liquidation cases. By analogy to the trustee's power to reject executory contracts, cases under prior law permitted the trustee to abandon property that was either worthless or overburdened or for any other reason when it was certain that the property would not yield any benefit to the general estate. This practice furthered the *paramount purpose of bankruptcy liquidation: the reduction of the debtor's property to money as expeditiously as practicable so as to secure funds for distribution to general creditors. Forcing a trustee to retain and administer property that was valueless or unprofitable is contrary to that purpose.* (emphasis added)

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[7]As such, decisions under the prior Bankruptcy Act relied upon by the Court of Appeals are not persuasive authority. See *Ottenheimer v. Whitaker*, 198 F.2d 289 (4th Cir. 1952), affirming 102 F. Supp. 913 (D. Md. 1952), and *In re Lewis Jones*, 1 B.C.D. 277 (Bk. Ct. E.D. Pa. 1974).

4 Collier on Bankruptcy, Section 554.01 (15th Ed.) Collier goes on to state that:

> Former section 70a of the Act vested title to the debtor's property in the trustee. Abandonment then divested the trustee of this title and revested it in the debtor. Under Section 541, the Trustee no longer takes title to the debtor's property, and, upon abandonment under Section 554, the trustee is simply divested of control of the property because it is no longer part of the estate. Thus, abandonment constitutes a divestiture of all interests in the property that were property of the estate.

4 *Collier on Bankruptcy,* Section 554.02 (2) (15th Ed.)

When a trustee abandons property, the property stands as if no bankruptcy had been filed. The property reverts back to the debtor as of the date of the commencement of the proceedings. In effect, the debtor is treated as having owned it continuously. *Mason v. CIR,* 646 F.2d 1309 (9th Cir. 1980). Liens encumbering property abandoned by the trustees are not affected, and the debtor holds in the same manner as prior to the filing of the bankruptcy. *In re Tarpley,* 4 BR 1945 (Bkrptcy Ct. Tenn 1980). The Trustee is deemed to have never had title to or custody of the property.

Upon abandonment, the trustee here stands as if he never had an interest in either facility. He has neither taken any action nor refrained from taking any action that would subject him to liability under state or local laws. The suggestion that the trustee could be personally exposed to criminal sanctions solely by virtue of his appointment by a federal court to serve as a trustee in bankruptcy is proof of how the objectives of the Bankruptcy Code will be frustrated by the Court of Appeals' decision.

It would be a different matter, of course, if the trustee had actually operated the property in his possession, which post-petition operation resulted in violations of environmental laws. To equate the trustee's sole act of taking custody of the property between the date of his appointment and the date of the abandonment to a disposal of hazardous wastes in violation of federal, state and local environmental laws quite obviously is a strained interpretation of the concept of abandonment. There being no violation of law on the part of the trustee, the trustee cannot be denied the right to abandon assets of the estate based upon these laws. Rather, for the trustee not to abandon this property would be violative of his duties enumerated in 11 U.S.C. Section 704. See also *In re Harper,* 175 F. 412 (N.D.N.Y. 1910); *In re Zehner,* 193 F. 787 (A.D. La. 1912); *In re Watts,* 19 F.2d 526 (E.D. La. 1927); and *Bowman v. Towery,* 207 Okla. 4, 248 P. 2d 1030 (1952).

It appears that the Court overlooked the correct analysis of abandonment under the Bankruptcy Court in efforts to dramatize a confrontation between bankruptcy law and environmental safety.

E. The states are to be treated as general unsecured creditors having claims arising out of pre-petition conduct of the debtor.

1. The claims of New York and New Jersey are not entitled to priority or administrative expense status.

The question of the right of governmental units to priority or administrative expense status was addressed by Congress in connection with the enactment of the ex-

ception to the automatic stay provisions. 11 U.S.C. Section 362. The Congressional House Report Comments on Section 362 include the following:

> Paragraph (4) excepts commencement or continuation of actions and proceedings by governmental units to enforce police or regulatory powers. Thus, where a governmental unit is suing a debtor to prevent or stop violation of fraud, environmental protection, consumer protection, safety, or similar police or regulatory laws, or attempting to fix damages for violation of such a law, the action or proceeding is not stayed under the automatic stay.
>
> Paragraph (5) makes clear that the exception extends to permit an injunction and enforcement of an injunction, and to permit the entry of a money judgment, but *does not extend to permit enforcement of a money judgment.* Since the assets of the debtor are in the possession and control of the bankruptcy court and since they constitute a fund out of which all creditors are entitled to share, *enforcement by a governmental unit of a money judgment would give it preferential treatment to the detriment of all other creditors.* (emphasis added.)

H.R. Rep. No. 595, 95th Cong. First Sess. 343 (1977), reprinted, in (1978), U.S. Code Cong. & Ad. News 5963, 6299. The intent to deny priority or preferential treatment is clear.

As pointed out in the decision in *Charles George Land Reclamation Trust,* supra, Congress had an additional opportunity to consider the question of the priority of federal and state governmental claims for cost of cleaning up hazardous substances. A bill introduced by Rep. Florio on September 23, 1982 (H.R. 7172) would have given priority to such claims. The bill was defeated. The fact that it was necessary to introduce such a bill also in-

dicates that such priority is not accorded to these claims under the bankruptcy code.

New York and New Jersey further appear to seek a "super-priority" status for their claims such as that contemplated by 11 U.S.C. Section 364(c). Nowhere in the Bankruptcy Code can there be found an express or implied intent to accord such status to any claims other than those expressly set forth in the Code.

As to whether the claims of New York and New Jersey could be accorded administrative expense status under 11 U.S.C. Section 503(b)(1)(A), Judge Gibbons, in his dissenting opinion, characterized as "preposterous" the contention that the cleanup costs for assets which are of no value to the estate could be classified as "necessary costs and expenses of preserving the estate." 11 U.S.C. Section 503(b)(1)(A). While, as noted by the majority, the categories enumerated in Section 503 are not exclusive, it is clear that all categories relate to preservation of the estate. In no way will a cleanup of the properties benefit or preserve the estate. The only result can be the exhaustion of all assets of the estate and the denial to all other creditors of the right to share in the distribution of the estate.

A recent Bankruptcy Court decision from the Northern District of Ohio does, however, accord administrative expense priority to a claim of the United States Environmental Protection Agency ("E.P.A.") for reimbursement under the Comprehensive Environmental, Response, Compensation and Liability Act of 1980 ("CERCLA"), 42 U.S.C. Section 9601, et seq., for reimbursement of costs incurred by EPA in removing hazardous material from a site operated by the debtor. *In re T. P. Long Chemical,*

Inc., 45 B.R. 278 (Bkrptcy N.D. Oh. 1985). While that case is factually distinguishable on several grounds,[8] the importance of the *Long* case for this case is the Court's handling of the claim for reimbursement of cleanup costs. While we believe that the Court's analysis of the trustee's right to abandon the property which relies in large measure upon *In the Matter of Quanta Resources Corp., etc.*, supra, is incorrect, we also believe that the Court erred in its reasoning on the question of priority.

The decision merely contains the following conclusory statement of the question of priority:

> Since the estate cannot avoid the liability imposed by CERCLA, it follows that the costs incurred by the EPA in discharging this liability is an actual necessary cost of preserving the estate entitled to administrative expense priority.

In re T. P. Long Chemical, Inc., supra at 286. The sole support for this proposition is the case of *In re Vermont Real Estate Inv. Trust*, 25 B.R. 84 (Bkrptcy Vt. 1982),

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[8]A. The claim was made the federal government under CERCLA;

B. The tank which was opened resulting in a release of the hazardous substance which prompted the cleanup by the EPA had been sold to a third party prior to the spill;

C. Other buried drums containing hazardous material were buried at the rear of the property unknown to anyone except the debtor himself;

D. The debtor as debtor-in-possession did operate the business at this site while the case was under Chapter 11;

E. The trustee did not take positive steps to abandon the property prior to the time EPA took its removal action;

F. There were sufficient assets in the estate to reimburse the EPA.

which was a Chapter 11 proceeding where the debtor leased certain real property. A part of the leasehold premises collapsed due to the weight of accumulated snow resulting in a dangerous condition. Upon the failure of the debtor to demolish the remainder of the collapsed building, the City of Montpelier proceeded with the work and asserted a lien against the leasehold premises for reimbursement of its $8,500.00 expenditure.

In according administrative expense status to the claim, the Court held that it was an actual, necessary cost and expense of preserving the estate. The Court noted that it was necessary for the preservation of the leasehold as part of the debtor's estate. *In re Vermont Real Estate Inv. Trust,* supra at 806.

We do not believe that the *Vermont* case stands as authority for the proposition that costs incurred for clean-up or removal of hazardous wastes, which costs in no way benefit the estate, are entitled to administrative expense status. While the Court in *In re T. P. Long Chemical, Inc.,* supra, may be correct in holding that EPA was entitled to a claim under CERCLA for the costs of removal, we believe that the Court erred in according the claim administrative expense priority.

In the context of reorganizations, it has been held that in order for a claim to be granted administrative priority, it must arise from a transaction with a debtor in possession and be beneficial to the debtor in possession in the operation of the business. *In re Mammoth Mart, Inc.,* 536 F.2d 950 (1st Cir. 1976); *Matter of Jartran, Inc.,* 732

F. 2d 584 (7th Cir. 1984). Extending this reasoning to the case of a trustee in liquidating an estate, administrative priorities should only be given to those expenses which arise from a transaction with the trustee which is beneficial to the trustee in liquidating the estate. Costs of remedying conditions existing at the time of the filing of the bankruptcy petition do not arise from a transaction with the Trustee nor, under the facts of this case, are they beneficial to the Trustee. Administrative expense status therefore is inappropriate for claims seeking redress for pre-bankruptcy acts of the debtor.

2. There exists no basis for subordination of administrative, secured, and other unsecured claims to the claims of New York and New Jersey.

What the state and local governmental units effectively seek here is a subordination of all other claims, whether secured, super-priority, administrative or unsecured, to their claims. New York seeks reimbursement of the $2.5 million it expended subsequent to the trustee's abandonment of the Long Island City site. New Jersey, not having spent any money, seeks to compel the Trustee to undertake removal of hazardous materials from the Edgewater, New Jersey site. In any event, the states want these claims to be paid first. New York, in seeking to reach assets of the debtor located in New Jersey, actually seeks more than its own statute permits.

Under Section 510 of the Bankruptcy Court, 11 U.S.C. Section 510, courts have jurisdiction to subordinate, on equitable grounds, all or any part of an allowed claim or interest to all or any part of another allowed claim or interest. Before the Bankruptcy Court will exercise its power of equitable subordination, however, three conditions must be satisfied:

(1) The claimant must have been engaged in some type of inequitable conduct;

(2) The misconduct must have resulted in injury to creditors of the bankrupt or conferred an unfair advantage on the claimant, and

(3) Equitable subordination of the claim must not be inconsistent with the provisions of the Bankruptcy Act. *Matter of Mobil Steel Company,* 563 F. 2d 692, 700 (5th Cir. 1977); *In re American Lumber Company,* 5 B.R. 470 (D.C. Minn. 1980). The fundamental aim of subordination is to undo or to offset any inequity in the claim position of a creditor that will produce injustice or unfairness to other creditors in terms of the bankruptcy result. *In re Kansas City Journal-Post Co.,* supra; *In re Westgate-California Corp.,* 642 F. 2d 1174 (9th Cir. 1981). Generally, the claim will not be subordinated unless it is shown that the claimant has acted inequitably in the course of his relationship with the debtor and that those activities have harmed the debtor or his other creditors in some way.

In re Ahlswede, 516 F. 2d 784, 788 (9th Cir. 1971); *In re Westgate-California,* supra.

There has been no allegation, and there exists no basis for any allegation, that the Trustee or any other creditor engaged in any inequitable conduct or misconduct which harmed the debtor or respondents. There is no basis in the Bankruptcy Code or case law for subordination of any claims to the claims of New York and New Jersey.

F. Under the circumstances of this case there is no irreconcilable conflict between the Bankruptcy Code and environmental protection.

Abandonment here actually serves to accommodate state environmental laws rather than to abrogate the enforcement of these laws. Abandonment would represent no additional environmental destruction; it would merely leave unrepaired past misconduct for which the states have pre-petition claims.

The Code itself effects a reasonable accommodation between regulatory enforcement and the protection of the debtor and the estate in bankruptcy. Governmental authorities are unimpeded in requiring that a debtor's ongoing conduct comply with environmental or other regulations. When they seek to remedy pre-bankruptcy violations, however, they are limited to collecting their allotted

share of the estate in bankruptcy and invoking any available exceptions to discharge, thus preserving both the respective shares of other creditors and the fresh financial start provided the debtor by the discharge.

Upon the failure of a landowner to implement cleanup measures, both the New York and the New Jersey statutes relied upon by respondents below are similar in result. If the state undertakes cleanup of the property and disposes of the hazardous waste, the state then becomes entitled to a lien.[9] By way of example, the New Jersey Spill Compensation and Control Act, N.J.S.A. 58:10-23.11, *et seq.* creates:

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[9]The City of New York filed a Proof of Claim on October 7, 1982, in the sum of "approximately $5,000,000.00". The City claimed a lien pursuant to New York City Administrative Code Section 564.245 upon the Long Island City premises "for all expenses incurred by the City of New York in securing, removing and properly disposing the materials unlawfully placed there by the debtor."

The New York State Department of Environmental Conservation filed a Proof of Claim on July 14, 1982 in an amount "to be determined". The claim states that the cost of removal and disposal of waste oil and other hazardous substances constitutes its claim. New York State also claimed a first lien on the Long Island City property.

The Proof of Claim of the New Jersey Department of Environmental Protection, filed July 20, 1982, asserts that it is a "claim for an administrative expense of the estate which should be given priority over all secured claims of the estate". New Jersey further claimed "that all money received by the Trustee from the sale of oil or equipment at the facility in Edgewater should be applied toward the proper closure and cleanup of the facility".

> A first priority claim and lien paramount to all other claims and liens upon the revenues and all real and personal property of the discharger, whether or not the discharger is insolvent.

N.J.S.A. 58:10-23.11f. The claim and liens arise upon any expenditure by the administrator of the New Jersey Spill Compensation Fund.[10]

In this case, the City and State of New York, upon abandonment by the Trustee, received exactly what they claim they are entitled to, a lien on the New York property of the debtor. New Jersey, not having made any expenditures, was not entitled to a lien. If and when New Jersey does expend money, it will be free to pursue its remedies against the real property in Edgewater, New Jersey.

The states are free to direct future conduct of debtors and debtors-in-possession, but enforcement addressed to past regulatory violations necessarily takes the form of submitting a claim for allowance in bankruptcy and receiving whatever is paid in a distribution governed by the Code's priorities. See Hennigan, *Accommodating Regulatory Enforcement and Bankruptcy Protection*, 59 Am. Bankr. L. J. 1 (1985).

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[10]The Act was amended effective January 25, 1985, to limit the so-called "super-lien" to the property for which the expenditure was made.

CONCLUSION

In a footnote to the most recent decision involving the Bankruptcy Code and state environmental regulation, this Court described a situation factually identical to the case presently before the Court:

> Had no receiver been appointed prior to Kovacs' bankruptcy, the trustee would have been charged with the duty of collecting Kovacs' nonexempt property and administering it. If the site at issue were Kovacs' property, the trustee would shortly determine whether it was of value to the estate. If the property was worth more than the cost of bringing it into compliance with state law, the trustee would undoubtedly sell it for its net value and the buyer would clean up the property, in which event whatever obligation Kovacs might have had to clean up the property would have been satisfied. If the property were worth less than the cost of cleanup, the trustee would likely abandon it to its prior owner, who would have to comply with the state environmental law to the extent of his or its ability.

Ohio v. Kovacs, supra at 711.

This is precisely the situation here. No receiver was appointed prior to Quanta's bankruptcy. The trustee therefore was charged with the duty of collecting Quanta's nonexempt property and administering it. The Trustee made the determination, which has not been disputed, that the New York and New Jersey sites were of no value to the estate. The properties were not worth more than the cost of bringing them into compliance with state law. There were no prospective buyers willing to assume the responsibility to clean up the sites. The trustee was justified in seeking, under Section 554(a), and required, under Section 704, to abandon the property. The obligation for

cleanup then devolved upon the parties having a possessory interest in the property.

To hold otherwise would conflict with this Court's construction of the Bankruptcy Code and run afoul of the Supremacy Clause and Fifth Amendment to the Constitution.

In the concurring opinion in *Kovacs,* Justice O'Connor expressed the view that the Court's holding could not be viewed as hostile to state enforcement of environmental law. 105 S. Ct. at 712. Here too, abandonment by the trustee is not hostile to the states' rights to assert their entitlement to liens against the abandoned property, whether under federal or corresponding state law, or to pursue claims for reimbursement against the estate. Abandonment by the trustee permits the states to proceed with any necessary cleanup and pursue their available remedies under state law free from any requirement of obtaining permission from the Bankruptcy Court. Abandonment additionally removes the property from the custody of the trustee, who was powerless to do anything to correct the hazardous conditions or to protect the public against the potential hazards. Abandonment insured that the necessary remedial action could proceed expeditiously.

Environmental policy surely would not be advanced by leaving the hazardous sites in the control of a bankruptcy trustee who was unable even to maintain security. If the unlikely situation arose that a bankruptcy trustee had assets sufficient to undertake a cleanup, which cleanup in turn would produce a return to the estate upon sale of the cleaned up site in excess of the cost of the cleanup, this would be an entirely different matter. Under the

circumstances of this case, environmental policy is best served by removing the trustee from the picture and allowing the states to take appropriate action. A denial of abandonment would have only served to impede and needlessly delay the cleanup efforts by the states. Leaving the trustee in possession would have undercut the ability of the governmental entities to promote "public health and safety".

Based upon the foregoing it is respectfully submitted that the decisions of the United States Court of Appeals for the Third Circuit be reversed.

Respectfully submitted,

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